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JAMES D. MAHER
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Supreme Court of the United States,

OCTOBER TERM, 1914.

No. [redacted] 218

JAMES SIM,

Petitioner,

against

WILLIAM EDENBORN,

Respondent.

No. 262. [redacted] 9

THOMAS P. ALDER,

Petitioner,

against

WILLIAM EDENBORN,

Respondent.

BRIEF IN REPLY FOR PETITIONERS.

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Supreme Court of the United States.

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JAMES SIM, Petitioner, AGAINST WILLIAM EDENBORN, Respondent.	No. 261.
THOMAS P. ALDER, Petitioner, AGAINST WILLIAM EDENBORN, Respondent.	No. 262.

BRIEF IN REPLY FOR PETITIONERS.

POINTS.

FIRST:—RESPONDENT'S BRIEF DOES NOT DISPUTE THE CORRECTNESS OF OUR FIRST POINT THAT PROPER DEFERENCE AND RESPECT FOR THE NEW YORK COURT OF APPEALS SHOULD HAVE LED THE CIRCUIT COURT OF APPEALS TO LEAN TOWARD FOLLOWING THE DECISION IN *Hecksher* VS. *Edenborn*.

I.—In view of this decision, which was before the Circuit Court of Appeals, it is difficult to explain the

omission to notice and apply said rule on any other theory than that of inadvertence. These cases were peculiarly appropriate for its application because the Circuit Court of Appeals regarded them as "balanced with doubt", stating in its opinion that "where Judges have differed as much as they have in this case, no conclusion can be reached with confidence." Respondent's counsel does not claim that the cases were free from doubt, but apparently acquiesces in the doubt expressed by the Circuit Court of Appeals.

II.—Every point urged by respondent was presented to and considered by the New York Court of Appeals in *Hecksher* vs. *Edenborn*. That Court unanimously reached the conclusion that these points were not well taken. Notwithstanding this the Circuit Court of Appeals rejected the decision in *Hecksher* vs. *Edenborn*, which the Referee followed, and reversed the judgments.

III.—We take the liberty of referring to the petitions and brief on our motions for writs of *certiorari*, which show that the writs were applied for chiefly on the ground that the Circuit Court of Appeals should have applied this rule and followed the decision of the New York Court of Appeals. The facts and law upon this subject are there fully presented. Public interest in uniformity of decisions in the courts, and the necessity of avoiding conflict between Federal and State courts, make it important that the rule should be enforced. We submit that plainer cases than these for its enforcement could scarcely be presented.

SECOND:—RESPONDENT DOES NOT DISPUTE OUR SECOND POINT, VIZ.: THAT IF HE WAS NOT PUT *in statu quo* HIS OWN WRONGDOING PREVENTED IT, AND HE SHOULD BEAR THE CONSEQUENCES.

I.—Respondent's brief endeavors to present respondent as innocent of wrongdoing, as acting in good faith, and not attempting to deceive or defraud, but this effort is not borne out by the facts found and is contrary to the Referee's finding. The complaint alleged that it was defendant's duty to make adequate, full and complete disclosure of his ownership of stock in the United States Iron Company and of his interest therein and of any other facts which affected the interest of the subscribers to the syndicate agreement (Record, p. 5, fol. 14). The answer did not deny this duty, and the Referee found as alleged in the complaint. He also found that respondent failed and omitted to make such disclosure and that his failure so to do operated in law as a fraud (Record, p. 119, fol. 355). We have shown in our brief that it was unnecessary to a decision of the case that the Referee should find a fraudulent *intent*, or anything more than the non-disclosure and concealment, which he did find, to support the judgment he rendered, and which the Circuit Court of Appeals held did support it.

II.—Upon the question of good faith, false statements, misrepresentations, fraudulent suppression of material facts and of deceit and fraud, the Referee was requested by respondent to find their absence and refused to find that respondent's acts were in good faith (Record, p. 718, fol. 2154), or that he made no false statements or representations (Record, p. 719, fol. 2155; p. 727, fol. 2179; p. 729, fol. 2185; p. 730, fol. 2189), or did not deceive or defraud (Record, p. 736, fol. 2206), or made no misrepresentations and committed no fraud (Record, p.

738, fol. 2215; p. 739, fol. 2216; p. 744, fol. 2280), or was guilty of no fraudulent suppression of material facts (Record, p. 745, fol. 2235; p. 746, fols. 2236, 8 and 9). Far from exonerating him from wrongdoing in these respects he declined to exonerate him.

III.—With respect to restoring the *status quo*, respondent's argument is founded on obstacles to a complete rescission, which were created by and arose out of his wrongful acts in connection with procuring subscriptions to the agreement as prepared by him, and consummated under his management. The Referee finds that he conceived the scheme; was its promoter; embodied it in the syndicate agreement; invited subscriptions to it; had himself appointed agent and attorney of the subscribers under it; and undertook to direct and manage it as agent and attorney of the subscribers with power to carry out the agreement, which had as its prime object the purchase by him as agent for the syndicate from himself his own stock in the United States Iron Company (see p. 6 of Petitioner's Brief). It is evident, therefore, that the form and substance of the syndicate agreement and everything done under and in execution of it was under his management and control. It necessarily follows that the obstacles and complications in the agreement or which arose in executing it were created by him. He alone was responsible for them and is in no position to urge that because of them he was not and could not be placed in *statu quo*.

IV.—With respect to the decision in the case of *Getty* vs. *Devlin* (54 N. Y. 20), that case is dealt with and distinguished by Judge Hiscock in his opinion in *Hecksher* vs. *Edenborn*, and its inapplicability pointed out.

V.—We can hardly suppose that respondent's counsel intends under his First Point to urge that the petitioners knew of respondent's ownership of stock in the United States Iron Company, but, however this may be, it is only necessary to call attention to the Referee's finding (p. 117, fol. 350) as follows:

> "The said subscribers to the syndicate agreement and each of them * * * had no knowledge of the defendant's ownership of the said shares in the United States Iron Company or of his being possessed of any pecuniary interest therein or of any interest therein, and the said subscribers made their subscriptions and each of them in ignorance of the fact of defendant's ownership in said stock and of his interest in said United States Iron Company."

THIRD:—RESPONDENT'S ARGUMENT BASED ON THE AGREEMENT ITSELF AND THE ACTS IN EXECUTING IT FAILS TO ATTACH DUE WEIGHT TO DEFENDANT'S FRAUD AT THE VERY BEGINNING IN OBTAINING SUBSCRIPTIONS BY FRAUDULENT CONCEALMENT OF MATERIAL FACTS.

I.—This is the subject matter of our complaint. The agreement declares at the outset that "whereas an opportunity is afforded for acquiring the stock of the United States Iron Company at par", etc.; its main purpose and object was to avail itself of this opportunity. Behind the syndicate agreement we discover respondent as the dominant and chiefly interested figure. When he had himself appointed agent and attorney of the subscribers to the agreement to purchase the stock of the United States Iron Company at par, his first step in committing the fraud was to conceal the fact that he was the majority stockholder, and was having himself appointed agent and attorney to buy

from himself his own property; the next was to make, and permit Elwood to make fictitious subscriptions, payable in cash, holding out as an inducement that he had subscribed $500,000. and Elwood $300,000. payable in dollars (p. 109, fol. 325), which the Referee finds neither he nor Elwood intended to pay in cash (p. 753, fol. 2259).

His object was nothing more or less than to empower himself to buy from himself his own property and induce subscriptions upon the representation that he, Elwood and Williams had subscribed $851,800. in cash, which neither of them intended to pay in cash, but almost entirely in stock of the United States Iron Company, and by so doing unload upon the syndicate subscribers stock of the United States Iron Company, and secure to himself the benefit of their cash subscriptions.

II.—It is of no consequence what was done subsequently, the material fact being that the fraud was consummated. It is also of no consequence whatever what part his co-syndicate managers had in the transaction. Although it seems scarcely possible that at the outset they did not know respondent's purpose, the time came when they did know. At all times they owed a duty to the syndicate subscribers, for whom they were acting as agents, and when it came to their knowledge that he was engaged in selling to the syndicate his own property, it was their duty, under penalty of participating in his fraud, to repudiate the transaction. Not having repudiated it, they became equally guilty with him. They lent themselves to respondent's fraudulent scheme. Neither of them was called as a witness; neither offered an explanation; it was the respondent's duty to call them if they could exonerate him and themselves, and every presumption is that they could not, and that their testimony, if it had been

forthcoming, would have been adverse. They were, however, mere figure heads for the respondent who, as the Referee finds, was the promoter and manager of the syndicate, and personally received the syndicate subscriptions (p. 756, fols. 2268-9).

III.—The New York Court of Appeals properly characterized respondent's conduct as fraudulent. That Court looked behind the transaction; stripped it of extraneous surroundings, and found behind it respondent, conceiving and executing a scheme founded in fraud. That Court therefore applied a well-recognized remedy and held that the petitioners were entitled to rescind and call upon respondent to return the amount paid upon restoring, as far as possible, what had been received.

IV.—The case considered on principle is similar to those where subscriptions are cancelled, or where subscribers defend actions on subscriptions, on the ground of fraud. As in such cases fraud relieves subscribers from subscriptions before the subscriptions have been paid, so in the present case a subscriber is entitled, after payment of his subscription, to demand repayment on the ground that the subscription was vitiated and a nullity, having been obtained by fraud.

V.—Respondent argues as to the serious consequences to him in being compelled, as incorrectly said, to "buy back" the subscribers stock. The expression is fallacious and misleading. With the consequences, the courts are not concerned. It is well said in *Masson* vs. *Bovet* (1 Denio, 69), "the law cares very little what his, the wrongdoer's, loss may be, and exacts nothing for his sake."

VI.—Respondent's counsel argues as if both parties stood upon an equal footing, which is incorrect.

There was a relation of trust and confidence. The respondent owed an affirmative duty to be open and above board, and that his conduct should be just, fair and free from suspicion. The burden of proof was upon him to satisfy the Court in this respect, and in this he failed.

VII.—All through the transaction respondent's interest was a stock interest. He did not part with this, as the result of the transaction was to turn over his stock, and an amount of cash, to the Sheffield Coal and Iron Company, which was the United States Iron Company with its name changed. In return he received certificates of stock in the Sheffield Coal and Iron Company. Just as he received certificates of stock in the Sheffield Coal and Iron Company as representing his interest, so the syndicate subscribers received like certificates representing their interest. When respondent's fraud upon the syndicate subscribers was discovered they restored to him the stock which they received as representing their interest, and thus gave him back everything they had acquired.

VIII.—Respondent's counsel argues as if it were necessary for the subscribers to undo the entire syndicate agreement, and what had been done under it, as preliminary to relief. This error arises from a failure to distinguish between undoing a subscription to the syndicate agreement and undoing what is done under the syndicate agreement. Just as a suit to cancel a subscription and remove the name of the subscriber, or the defense to an action upon a subscription on the ground of fraud leaves subscription agreemeuts in force and effect as against non-defrauded subscribers, so in these cases rescission of a syndicate subscription on the ground of fraud, and a demand of repayment from the perpetrator of the fraud, leaves the syndicate agreement

in force as against non-defrauded subscribers. No case is cited by respondent's counsel and none can be found, we believe, which requires in such cases that the defrauded party must, before he can avail himself of the remedy of rescission for fraud, undo all that has been done under the syndicate agreement itself. Rescission for fraud and demand of repayment is precisely the same in principle and effect as where subscriptions are cancelled or defenses are interposed to subscriptions on the ground of fraud, and restoration of the *status quo* is required "as far as possible" and not further.

FOURTH.—THERE ARE, IN FACT, BUT TWO QUESTIONS WHICH REQUIRE CONSIDERATION AND A DECISION OF EITHER OF THEM IN OUR FAVOR WILL LEAD TO A REVERSAL OF THE JUDGMENT.

I.—The first concerns the duty of the Circuit Court of Appeals to lean toward following the decision of the New York Court of Appeals in *Hecksher* vs. *Edenborn*.

II.—The second relates to the question whether the petitioners did as far as possible put the respondent *in statu quo*. We have sought to satisfy the Court that he was in fact put *in statu quo*, and that if he was not it was his own wrongdoing in complicating the transaction that prevented it.

III.—The Circuit Court of Appeals held that the respondent was guilty of constructive fraud, and that the subscriptions were capable of being rescinded on that ground, and that the facts found supported the judgment. Its decision was based upon the sole ground that the facts stated in the complaint did not show that he was placed *in statu*

quo. The facts found by the Referee follow the allegations of the complaint and if, as the Circuit Court of Appeals correctly held, the facts found support the judgment rendered, it follows that the facts set forth in the complaint supported the judgment.

IV.—Supplementing the discussion of this question in our main point, we respectfully call the attention of the Court to two points:

(1) It is not assigned as error that the facts stated in the complaint, nor (2) that the facts found by the Referee, did not support the judgment rendered.

V.—There are 224 assignments of errors and not one of them assigns error in either of these respects. Inasmuch as respondent was so minute in specifying errors as to specify 224 no special indulgence is called for in his omission to assign the errors upon which he now relies.

VI.—With respect to the first eight assignments of errors (pp. 787–9, fols. 2359–2365) they relate to the sufficiency of the complaint, with the exception of those dealing with an alleged defect of parties and an improper joinder of causes of action. They are of the most general character and specify nothing with particularity. This has been frequently held to be contrary to the office of an assignment of errors and to the rules laid down concerning them. To meet these points respondent's counsel calls attention to certain cases in this Court, but none of them have any bearing, as this question was not raised, while in the case of *Chicago* vs. *Clark* (178 U. S. 353) error was assigned that the findings did not support the judgment. This subject is considered by this Court in *Behn* vs. *Campbell* (205 U. S. 483), from which it appears that while errors not stated in the assignments of errors have sometimes

been considered, the limit of this practice is accurately stated in the 35th rule of the Court, and that errors not assigned will be disregarded except that the Court at its own option may notice a plain error not assigned, and that the Court will not be astute in selecting statements of law and subjecting them to minute scrutiny where, on the whole, it is clear that the facts found by the Court justify the judgment which it rendered.

VII.—If the assignment of such a multitude of errors is, as has been said, "a perversion of the rule," we submit that where counsel have taken pains to search the record for every conceivable error and assign it, the omission to assign with particularity what he claims is the principal error in the case and what he is pleased now to call "plain error not assigned" ought to prevent a consideration of such errors not assigned. The errors not assigned which he would have this Court consider are not, we believe, in any sense "plain errors"; they are, at most, doubtful and questionable errors and, in fact, not errors at all. We think that the Circuit Court of Appeals was not justified, in the absence of proper assignments of errors in the respects referred to, in disposing of the case upon errors not assigned.

Briscoe v. *District of Col.*, *221 U. S. 547.*
Pickett v. *U. S.*, *216 U. S. 456.*
Foster Fed. Pr., Vol. III, p. 2473.

VIII.—We submit that the judgments should be reversed.

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